Judge: Hon. Marc L. Barreca
Chapter: Chapter 7
Hearing Date: February 17, 2012
Hearing Time: 9:30 a.m.

UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re: ADAM GROSSMAN , Debtor. --- RONALD G. BROWN, solely in his capacity as Chapter 7 Trustee of the estate of Adam Grossman, Plaintiff, vs. KEYWEST FINANCIAL, LLC., Et. Al. Defendant.	Case No. 10-19817 **TRUSTEE'S RESPONSE TO DEBTOR'S MOTION FOR ORDER THAT PROCEEDING IS ONE UNDER STOCKBROKER LIQUIDATION SUBCHAPTER III**

Ronald G. Brown, the Chapter 7 Trustee in the above-captioned case, by and through his undersigned counsel, responds to the Debtor's Motion for Order that Proceeding is One Under Stockbroker Liquidation Subchapter III (Debtor's Motion") as set forth below.

I. BRIEF FACTUAL BACKGROUND

The Debtor filed a voluntary chapter 11 bankruptcy petition by filing a short-form petition on August 19, 2010. Ronald Brown was appointed as the Chapter 11 Trustee pursuant to court order dated December 22, 2010.

On February 22, 2011 the Trustee filed a motion to convert the chapter 11 case to a chapter 7 (docket #89). On March 5, 2011 the Debtor filed a motion to convert the chapter 11

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case to a chapter 13 (docket #104). The debtor's motion to convert to a chapter 13 was denied and the Trustee's Motion to convert the case to a chapter 7 was granted. An order converting the case to a Chapter 7 was entered on March 11, 2011(docket #118).

On May 19, 2011 the debtor filed a second motion to convert the case to a chapter 13 (docket #165). On October 31, 2011 this motion to convert was withdrawn.

On November 2, 2011 the debtor filed an amendment to his voluntary petition pursuant to which he changed his answer to the question of "nature of business" on page 1 from "other" to "stockbroker". The debtor's counsel then took the position that this pending case was no longer an individual chapter 7 case because it was a stockbroker liquidation pursuant to 11 U.S.C. section 741e et. seq. The Trustee refused to agree that by checking the "stockbroker" option box on the voluntary petition the case was automatically converted to a stockbroker liquidation under section 741 et. seq. On January 12, 2012 the Debtor's Motion was filed seeking affirmation from this Court that by checking the "stockholder" option box per an amendment to the schedules, the case was converted.

II. ARGUMENT

The Debtor does not Qualify for Conversion of this Case.

It is well settled law that a court may disallow conversion if a debtor has engaged in fraudulent conduct or if conversion would be an abuse of process. Marrama v. Citizens Bank, 549 U.S. 365, 127 S. Ct. 1105, 166 L.Ed 2d 956 (2007).

There is no dispute in this case that the debtor engaged in substantial fraudulent conduct when he transferred all of the assets of this estate to Keywest Financial, LLC on December 14, 2010, for no consideration and without court approval. See docket #30 in adversary proceeding 11-1954. Thus the debtor has engaged in fraudulent conduct and this Court needs to look no further in denying the Debtor's Motion.

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There is substantial abuse of process in this case (including the filing of this motion) which is another reason to deny this motion as set forth in Marrama, ibid. Abuse of Process is defined as in Black's Law Dictionary as an improper use or perversion of a process after it has been issued. Black's Law Dictionary, 5th Ed. Section 109(d) of the Bankruptcy Code contains an absolute prohibition from a stockbroker being in a chapter 11 proceeding. This debtor was in a chapter 11 proceeding for approximately 7 months, so if he truly is a stockbroker, his filing of the bankruptcy petition as a chapter 11, and thereafter remaining in a chapter 11 for 7 months was an improper use and perversion of the bankruptcy process.

A stockbroker cannot be a chapter 13 debtor pursuant to section 741 of the Bankruptcy Code. Thus if the debtor truly is a stockbroker, both the motions the debtor filed to convert this case to a chapter 13 (docket #104 and #165) were an improper use and perversion of the bankruptcy process.

It is interesting to note that at the section 341 meeting conducted on September 28, 2010 the Debtor testified that his primary business was buying and selling real estate. See Exhibit "3" to the Declaration of Denice Moewes filed simultaneously herewith ("Moewes Declaration").

The Debtor is not eligible to be a stockholder debtor

The debtor's bankruptcy schedules were filed under penalty of perjury, and in those schedules the debtor swore he was an individual involved in a business that was not that of stockbroker. Now approximately 19 months later the debtor remembered that he was a stockbroker instead of an individual whose business was the buying and selling of real estate? This is just not credible and brings to mind the following passage from Alice in Wonderland:

> I wonder if I've been changed in the night? Let me think. Was I the same when I got up this morning? I almost think I can remember feeling a little different. But if I am not the same, the next question is "who in the world am I" Ah, that's the great puzzle.

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Is the Debtor a stockbroker today or an individual who operates a business that is not in the nature of stockbroker, but one that buys and sells real estate? It appears the answer to this question changes as to how the Debtor feels when he wakes up in the morning, and more accurately, how he can continue to improperly use, pervert and delay the bankruptcy system for his own gain.

It is equally well settled that in order to convert a case the debtor must be eligible to be a debtor under the section to which the debtor is seeking conversion to. 11 U.S.C. Section 706(d). In this case it does not appear that the debtor has set forth a sufficient factual basis to ever meet his burden of proof that he can qualify to be stockbroker.

Section 101(53) sets forth the definition of stockbroker as an individual that has to (1) have a "customer" as defined in, and (2) be "engaged in the business of effecting transactions in securities—(i) for the account of others; or (ii) with members of the general public, from or for such person's own account."

The 9th Circuit, in the case of In re Slatkin, 525 F.3d 805, (9th Cir. 2008) has discussed the customer issue and stated:

> A "customer" includes an "entity that has a claim against a person arising out of ... a deposit of cash, a security, or other property with such person for the purpose of purchasing or selling a security." 11 U.S.C. § 741(2)(B)(ii). The Johnsons, like Slatkin's other investors, deposited funds with Slatkin for the purpose of having him purchase securities with those funds. The Johnsons were therefore "customers" of Slatkin. *See* 11 U.S.C. § 741(2)(B)(ii); *Wesbanco Bank Barnesville v. Rafoth (In re Baker & Getty Fin. Servs., Inc.),* 106 F.3d 1255, 1260 (6th Cir.1997) (" *In re Baker & Getty* ") (holding that defrauded investors who deposited funds with the debtor for the purpose of having the debtor purchase securities were "customers" of the debtor); *cf.* *Wider v. Wootton,* 907 F.2d 570, 573 (5th Cir.1990) (holding that a debtor's clients were not "customers" where the clients *did not provide* the debtor with a reservoir of cash from which to purchase securities, but instead paid the debtor only after the debtor had purchased the securities).

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The Trustee is unaware of any person or entity that has a pre-petition claim against Adam Grossman that arose out of a cash deposit, security or of property for the purpose of purchasing or selling securities, and Mr. Grossman has not demonstrated that there are any[1]. Moewes Declaration.

A review of the claims register shows that no one has made a claim against Mr. Grossman for cash deposits made to him for purchasing securities. Moewes Declaration.

Jeffrey Bernstein, the other member of the Terrington Davies Tanager Fund, LP and Terrington Davies, LLC. (collectively the "Fund"), has signed a declaration stating that 1) there were a total of 9 investors in the Fund; 2) he has no personal knowledge about Mr. Dellas not being paid as he had resigned, but believes the allegations to be true based on conversations and emails between Mr. Dellas and himself; 3) that he is unaware of any other investors who were not paid what they were owed from the Fund; and 4) he is unaware of any investors, other than Mr. Dellas, who have claimed they were not paid what they were owed. (Bernstein Declaration).

The debtor's declaration in support of the Debtor's Motion does not allege that parties have claims against him and the assets of this estate based on his involvement in the Fund, that there are investor funds that need to be disbursed, or that the trustee is in possession or control of said funds. It must be noted that the Debtor's Declaration is devoid of any supporting documentation[2], and in fact appears to be directly contrary to various documents he has

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[1] Similarly the debtor has failed to produce any documentation evidencing that the investor funds were given to him individually as opposed to the trading entities Terrington Davies, LLC or Terrington Davies Tanager Fund, LP . While Terrington Davies or Terrington Davies Tanager Fund might conceivably qualify as a stockbroker, the debtor does not. The customers were not customers of the debtor, but customers of the Fund, See Declaration of Jeffrey Bernstein filed simultaneously herewith ("Bernstein Declaration").

2[2] The Declaration of Adam Grossman indicates there are three exhibits attached, but in fact there are no exhibits attached to the declaration.

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previously submitted under penalty of perjury, including his bankruptcy schedules and the numerous amendments thereto.

If there are investor funds that needs to be disbursed to the investors of the Fund the Trustee is completely unaware of said funds and the trustee has no investor funds. The existence of any investor funds are not disclosed on the debtor's bankruptcy schedules or the numerous amendments thereto. Moewes Declaration.

The point of the stockbroker bankruptcy is to return investor funds to the investors. To date the trustee has received no funds from any investors. Moewes Declaration. The Trustee has sent two emails to the debtor's counsel asking for an explanation and documentation to evidence the claim that the Trustee is holding investor funds. To date no explanation has been given nor documentation produced in response to the emails or in support of the Debtor's Motion. Moewes Declaration, Exhibit "1".

The Dellas Claim

The allegation has been made that the Debtor stole approximately $165,000.00 from the Dellas Family Trust. In an email from Mr. Dellas to Jeffrey Bernstein Mr. Dellas basically states that he was to be paid out of the Fund in December, 2010. Moewes Declaration, Exhibit "2" By December, 2010 this bankruptcy proceeding had been pending for four months. There is no documentation of any nature produced by Mr. Grossman to indicate when the Dellas claim may have arisen. However, at the section 341 meeting conducted on September 28, 2010 the debtor testified that there was about $375,000.00 in the Fund and that there were no outstanding obligations of the Fund, further supporting the belief that the Dellas claim arose post-petition. Moewes Declaration, Exhibit "3".

Finally, if it is the debtor's intent to convert this case to a stockbroker case so the debtor can use pre-petition assets to pay for his alleged post-petition theft, that goal cannot be accomplished by a conversion. The Petition Date would not change by converting this case to

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a stockbroker bankruptcy, 11 U.S.C. section 348(b), and thus the Dellas claim would not be an obligation of this estate.

III. CONCLUSION

The trustee requests that this Court deny the debtor's motion with prejudice.

Dated this 10th day of February, 2012.

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